No. 17-532

In the
Supreme Court of the United States

CLAYVIN HERRERA,

PETITIONER,

v.

WYOMING,

RESPONDENT.

On Writ of Certiorari to the District Court of Wyoming, Sheridan County

BRIEF FOR TIMOTHY P. MCCLEARY, JANINE PEASE, ELIZABETH SWANK, ESTHER WYNNE, SARA BENJAMIN-NEELON, CAITLIN BORGMANN, MEGAN SINGER, AND SAMUEL ENEMY-HUNTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are experts in their respective fields of anthropology, education, law, and public health. Many of them have devoted their careers to studying, representing, educating, and treating the Crow Tribe of Indians. Because the decision below imperils public health by trampling the Tribe's treaty-protected right to hunt, amici file this brief in support of petitioner. The signatories to the brief, with affiliations provided for identification purposes only, are as follows:

Timothy P. McCleary, Ph.D., is an anthropology professor at Little Big Horn College in Crow Agency, Montana. He speaks and reads the Crow language and has spent much of his career researching, teaching, and writing about the origins, history, and contemporary beliefs and practices of the Crow people.

Janine Pease, D.Ed., is the founding president of Little Big Horn College, a recipient of the MacArthur "genius grant," and a former trustee of the Smithsonian's National Museum of the American Indian. She now teaches Crow Studies and other disciplines at Little Big Horn College. A member of the Crow Tribe, she is the great-granddaughter of White Man Runs Him, one of the Crow scouts who served with Lieutenant Colonel George Armstrong Custer at the Battle of the Little Bighorn.

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[1] Petitioner's and respondent's letters giving blanket consent to amicus briefs are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to this brief's preparation or submission.

Elizabeth Swank serves as the Public Health Emergency Preparedness Coordinator for the Public Health Department of Big Horn County, Montana, much of which is covered by the Crow reservation. As the spouse of a Crow hunter, she has firsthand knowledge of the dietary importance of keeping a freezer stocked with fresh elk meat throughout the long Montana winters.

Esther Wynne, R.N., B.S.N., P.H.N., serves as the Public Health Nurse for the Public Health Department of Big Horn County, Montana. After a quarter-century in that role, she has in-depth experience and understanding regarding the cultural and nutritional aspects of subsistence hunting, the importance of elk meat in the Crow way of life, the persistence of hunger on the Crow reservation, and the prevalence of obesity and type 2 diabetes among native peoples who have abandoned the traditional game-based diet.

Sara Benjamin-Neelon, Ph.D., M.P.H., J.D., R.D., is an Associate Professor in the Department of Health, Behavior and Society and Director of the Lerner Center for Public Health Promotion at Johns Hopkins Bloomberg School of Public Health. She is also a faculty fellow in the Centre for Diet and Activity Research at the University of Cambridge in England. As a public health researcher, her work focuses on policy and environmental approaches to chronic disease prevention in children and their families.

Caitlin Borgmann, J.D., is the Executive Director of the ACLU of Montana. The ACLU of Montana has adopted Indigenous Justice as the

organization's top priority, and Ms. Borgmann is responsible for implementing that strategic vision. Fundamental to the organization's work are principles of tribal sovereignty and treaty rights, including the right to hunt and fish outside reservation boundaries.

Megan Singer is the ACLU of Montana's Indigenous Justice Program Manager. Ms. Singer is an expert on the history of interactions between the United States Government and Indigenous peoples. Ms. Singer spends the vast majority of her time working with Indigenous communities to deepen understanding of issues related to public health, education equity, and tribal sovereignty.

Samuel Enemy-Hunter is an Indigenous Justice Organizer for the ACLU of Montana. An enrolled member of the Apsaalooke (Crow) Tribe, Mr. Enemy-Hunter works on and off the Reservation to advocate for the civil rights and civil liberties of Indigenous peoples. Mr. Enemy-Hunter is an Apsaalooke cultural and traditional leader and educator and an avid hunter. He advocates for treaty rights to hunt and fish as a form of vindicating tribal sovereignty.

SUMMARY OF ARGUMENT

The Apsaalooke people, known in English as the Crow Tribe of Indians, have "always valued hunting and gathering in Crow Country as an activity of the highest cultural importance and the means for survival." Crow Tribal Legislature, Joint Action Resolution No. 13-09 (May 7, 2013), *available at* https://goo.gl/sbo1Gj. In various treaties with the United States, the Tribe has protected its right to hunt in exchange for ceding traditional tribal lands to the United States. In this case, the Court is asked to interpret one of those treaties and to decide whether the Tribe's members may "maintain a traditional practice of subsistence hunting that is foundational to their identity and well-being." Pet. Br. 41.

Amici are concerned that the decision below harms the many members of the Crow Tribe who rely on traditional subsistence hunting to feed and nourish their families during the winter. Given the scarcity and expense of healthy foods on the Crow reservation, the need for subsistence hunting is pronounced. Without access to a regular supply of fresh meat, the health of the Crow Tribe's members will suffer. To avoid these unnecessary public-health consequences, this Court should reverse the decision below and restore the Crow Tribe's usufructuary rights. The United States has enjoyed the benefits of the Second Treaty of Fort Laramie for 150 years, and this Court should prohibit the State of Wyoming from destroying the rights of the Crow Tribe secured under the treaty.

ARGUMENT

I. The Crow Tribe's Right To Hunt Is Protected In Treaties With The United States.

This case turns on the continued viability of the last of a series of treaties between the Crow Tribe and the United States, called the Second Treaty of Fort Laramie, signed in 1868. The Tribe agreed to cede a significant amount of territory under the treaty, but took care to preserve its right to continue hunting on unoccupied lands. That right remains vitally important to the Crow way of life and to the health of the Crow Tribe's members.

1. The Crow Tribe migrated to what is now southern Montana and northern Wyoming centuries ago. *See Montana v. United States*, 450 U.S. 544, 547 (1981). In 1825, "[t]he United States agree[d] to receive the Crow tribe of Indians into their friendship [and] protection." Treaty with the Crow Tribe, U.S.-Crow, art. 2, Aug. 4, 1825, 7 Stat. 266, 1825 WL 3194. The United States undertook to regulate trade with the Tribe, *see id.* arts. 3–4, and to punish private violence against its members, *see id.* art. 5. In return, the Tribe acknowledged the supremacy of the United States, *see id.* art. 1, promised not to supply weapons to enemies of the United States, *see id.* art. 6, and committed to protect traders and others "authorized by the United States to pass through their country," *see id.* art. 4. This first treaty did not purport to define "the limits of [the Tribe's] district of country," *id.*, or to constrain tribal hunting. *Cf. United States v. Winans*, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the

Indians, but a grant of right[s] from them,—a reservation of those not granted.").

In 1851, "warfare between the Crows and several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie." *Montana*, 450 U.S. at 547. The signatory tribes agreed "to make an effective and lasting peace" among themselves, to give safe passage to settlers heading for California, and to "acknowledge [designated] tracts of country . . . as their respective territories." Treaty of Fort Laramie, arts. 1, 4, 5, Sept. 17, 1851, 11 Stat. 749, 1851 WL 7655, *reprinted in* 2 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 594–96 (1904); *see also id.* arts. 2, 3, 7, 8 (assigning rights and obligations to the United States). Reflecting the long-settled priorities of its people, the Crow Tribe refused to "surrender the privilege of hunting, fishing, or passing over" the territory that was designated for the other tribes. *See id.* art. 5. The designated Crow territory, confined to roughly 38.5 million acres in present-day Montana and Wyoming, was likewise subject to the usufructuary rights of the other tribes. *See id.*; *Montana*, 450 U.S. at 548; *United States v. Finch*, 395 F. Supp. 205, 215 (D. Mont. 1975), *rev'd*, 548 F.2d 822 (9th Cir. 1976), *vacated and remanded*, 433 U.S. 676 (1977) (mapping Crow territory circa 1851).

By 1867, continuing bloodshed in the West prompted the United States to create the Great Peace Commission, which negotiated nine separate peace treaties with various tribes. The Crow Tribe signed one of those peace treaties in 1868, known as the Second Treaty of Fort Laramie. *See* Treaty with

the Crow Tribe, U.S.-Crow, art. I, May 7, 1868, 15 Stat. 649, 1868 WL 24283. The treaty established a reservation on roughly 8 million acres in present-day Montana that would be "set apart for the absolute and undisturbed use and occupation of" the Crow Tribe, and on which the United States was to build a school and other buildings. *See id.* arts. II, III. The other 30 million or so acres of Crow territory were ceded to the United States. *See id.* art. II; *Montana*, 450 U.S. at 548; *United States v. N. Pac. Ry. Co.*, 311 U.S. 317, 354 (1940); *Finch*, 395 F. Supp. at 216 (mapping the Crow reservation circa 1868). A portion of the ceded lands would later become the Bighorn National Forest. *See* Proclamation No. 30, 29 Stat. 909 (Feb. 22, 1897).

Crucially for purposes of this case, the Second Treaty of Fort Laramie "addressed hunting rights specifically" with respect to the "lands outside the reservation boundaries." *Montana*, 450 U.S. at 559 n.7. The Crow Tribe agreed to make a permanent home on the much smaller reservation in exchange for the continuing "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." Treaty with the Crow Tribe, U.S.-Crow, art. IV, May 7, 1868, 15 Stat. 649, 1868 WL 24283. The United States was willing to exchange hunting rights for peace and millions of acres of land .

The Crow Tribe zealously guarded its preexisting usufructuary rights in the treaties that shrank its territory down to 38.5 million acres, and then down to 8 million acres. Given the central importance of

hunting on the ceded lands to the Crow way of life, it is hardly surprising that the Tribe insisted that the right to hunt be expressly protected in both the First and Second Treaties of Fort Laramie. As Justice Brown wrote of the Bannock Tribe:

> The right to hunt was not one secured to [the Indians] for sporting purposes, but as a means of subsistence. . . . [T]heir chief reliance for food has been upon the chase. The right to hunt on the unoccupied lands of the United States was a matter of supreme importance to them, and, as a result of being deprived of it, they can hardly escape becoming a burden upon the public.

Ward v. Race Horse, 163 U.S. 504, 518 (1896) (Brown, J., dissenting). In fact, members of the Crow Tribe were so determined to retain their treaty rights, they agreed to serve as scouts for the United States Army in the Plains Indian Wars, including at the Battle of the Little Bighorn. Having sacrificed so much to protect the right to hunt, members of the tribe greatly value off-reservation hunting on the ceded lands, particularly in the Bighorn Mountains.

2. The Crow Tribe should not be stripped of its usufructuary hunting rights, which the United States recognized in the Second Treaty of Fort Laramie and for which the Crow fought alongside Custer to preserve. Contrary to the decision below, and as petitioner explains, no justification for clawing back this treaty right can be found in *Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520 (D. Wyo. 1994), *aff'd* 73 F.3d 982 (10th Cir. 1995). That case held that under *Race Horse*'s equal-footing doctrine,

Wyoming's admission to the Union in 1890 repealed the Crow Tribe's right to hunt under the Second Treaty of Fort Laramie. *See* 866 F. Supp. at 524 (relying on *Ward v. Race Horse*, 163 U.S. 504 (1896)); 73 F.3d at 987–93 (same). A circuit split over this vital issue quickly emerged, leading to a grant of certiorari within three short years. *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 926–29 (8th Cir. 1997), *cert. granted*, 524 U.S. 915 (1998) (No. 97-1337). The Crow Tribe, which had been shocked by *Repsis*, joined an amicus brief arguing that *Race Horse* should be overruled. *See* Brief of National Congress of American Indians, et al. as Amici Curiae Supporting Respondents, *Minnesota v. Mille Lacs Band of Chippewa Indians*, No. 97-1337, 1998 WL 664966 (U.S. Sept. 25, 1998).

This Court agreed with the Crow Tribe, broadly holding that *Race Horse* "rested on a false premise" and that "[t]reaty rights are not impliedly terminated upon statehood." *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202–08 (1999); *see also id.* at 219–20 (Rehnquist, C.J., dissenting) (lamenting that the majority "effectively overrules *Race Horse sub silentio*"). Because the Supreme Court fatally undermined *Repsis*, the Crow Tribe advised federal and state officials that its "policy . . . shall be to exercise fully its treaty right to hunt on all unoccupied lands of the United States . . . located within the traditional Crow homeland," under the Second Treaty of Fort Laramie. *See* Crow Tribal Legislature, Joint Action Resolution No. 13-09 (May 7, 2013), *available at* https://goo.gl/sbo1Gj (observing that *Mille Lacs* "squarely rejected" *Repsis*).

To be sure, in the *Repsis* case the Tenth Circuit offered an alternative basis for extinguishing the Crow Tribe's right to hunt that was not addressed by the district court, but this Court should also reject that position. The Tenth Circuit wrongly stated that the Bighorn National Forest is not "unoccupied" within the meaning of the Second Treaty of Fort Laramie. *See Repsis*, 73 F.3d at 993. That conclusion was erroneous because the United States explicitly restricts occupancy of national forest lands. *See, e.g.*, 16 U.S.C. §§ 475, 551, 1604(*i*); 36 C.F.R. § 261.10; Proclamation No. 30, 29 Stat. 909–10 (Feb. 22, 1897); *United States v. Backlund*, 689 F.3d 986, 990 (9th Cir. 2012). Little wonder, then, that no other court besides the Tenth Circuit in *Repsis* and the courts below in this case have held that creation of a national forest abrogates Indian treaty rights. *See, e.g.*, *Confederated Tribes of Umatilla Indian Reservation v. Maison*, 262 F. Supp. 871, 873 (D. Or. 1966), *aff'd sub nom. Holcomb v. Confederated Tribes of Umatilla Indian Reservation*, 382 F.2d 1013 (9th Cir. 1967) (holding that national forest lands are "not occupied by white settlers," and thus are "unclaimed" within the meaning of a treaty that reserved usufructuary rights); Pet. 24–27 (collecting additional cases). It makes no sense to say that "creation of the Big Horn National Forest resulted in the 'occupation' of the land"—unless perhaps the elk are the occupants. *Repsis*, 73 F.3d at 993. This fact was recognized by United States in its certiorari-stage brief in this litigation, noting that "the fact that an area has been designated as a National Forest does not render that area occupied. Quite the opposite, the creation of the Bighorn National Forest meant

that those 'lands were no longer available for settlement.'" Brief of the United States as Amicus Curiae at 5, *Herrera v. Wyoming*, (No. 17-534) (quoting *Repsis*, 73 F.3d at 993). Accordingly, the opinion below should be reversed.

II. Retracting The Right To Hunt Threatens Public Health On The Crow Reservation.

The decision below poses a dire threat to the health of the members of the Crow Tribe by curtailing their longstanding right to hunt outside the reservation protected under the Second Treaty of Fort Laramie. The Crow Tribe continues to rely on "the off-reservation hunting right reserved in the 1868 Treaty" to feed their families. Pet. Br. 45.

1. For centuries, the Crow Tribe has enjoyed a heavily meat-based diet that includes bison, elk, deer, antelope, and other wild game. Robert H. Lowie, THE CROW INDIANS at xiv, 72 (2d ed. 1958); Thomas Yellowtail, YELLOWTAIL: CROW MEDICINE MAN AND SUN DANCE CHIEF, AN AUTOBIOGRAPHY 45 (Michael Oren Fitzgerald ed. 1991). Without these traditional food sources, "the Crow people would never have survived life on the plains." Alma Hogan Snell, A TASTE OF HERITAGE: CROW INDIAN RECIPES & HERBAL MEDICINES 67 (2006). "Without it they would [have] quickly perish[ed]." Yellowtail, *supra* at 45. Elk became particularly important as bison herds dwindled, offering a steady source of fresh meat, hides, and the eponymous component of the prized elk-teeth dress. *See, e.g.*, James Hagengruber, *Elk-Teeth Dress is Epitome of Crow Status and Style*, BILLINGS GAZETTE, Apr. 13, 2002, https://goo.gl/iyVc34. The Bighorn Mountains of Wyoming, located

within the Bighorn National Forest that was made with a portion of the Tribe's ceded lands, are particularly important to the Crow Tribe because they are the sacred hunting grounds according to Crow oral tradition.[2] It was in these mountains, at a place known to the Crow Tribe hunters as Aashawua (Round Valley), that petitioner killed the elk.

2. The sacred nature of the Bighorn Mountains for the Crow Tribe dates back to the Crow migration to Wyoming and Montana. Sacred tobacco was found by the first leader of the Crow Tribe at the base of Cloud Peak in what is now the Wyoming Bighorn Mountains. *See* Crow Tribe of Indians, *Culture and History*, *in* CROW INDIAN RESERVATION NATURAL, SOCIO-ECONOMIC AND CULTURAL RESOURCES ASSESSMENT AND CONDITIONS REPORT 43 (2002), *available at* https://deq.mt.gov/Portals/112/Energy/CoalbedMethane/Documents/CrowNarrative.pdf. The

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[2] Oral histories are an important repository of cultural information "both as a form of history and as [a] form of traditional literature." Bruce Miller, ORAL HISTORY ON TRIAL: RECOGNIZING ABORIGINAL NARRATIVES IN THE COURTS 137 (2011) (quoting Judith Berman, *"Some Mysterious Means of Fortune": A look at North Pacific Coast Oral History*, *in* COMING TO SHORE: NORTHWEST COAST ETHNOLOGY, TRADITIONS, AND VISIONS 129 (Marie Mauze, Michael E. Harkin, & Sergei Kane eds., 2004). "[T]he narratives often contain a great deal of what would, from a Western standpoint, be considered accurate historical information." *Id.* (quoting Berman, *supra* at 130). These histories are passed down "based on protocols of respect and connection to persons of authority" in their society. *Id.* at 137.

Bighorns were thereafter considered sacred and became the center of the historic Crow territory.

The Bighorn Mountains, Bighorn Canyon, and Bighorn River received their names from the story of Big Metal. Crow Tribe Exhibit 75, Joint Appendix, *Montana v. United States*, 450 U.S. 544 (1981) (No. 79-1128), 1980 U.S. S. Ct. Briefs LEXIS 1901, at *90–101. According to oral tradition, a Crow boy was stranded in the mountains and seven bighorn rams rescued him. *Id.* at *91–96. The bighorn rams shared their powers with the boy, and the leader of the rams, gave the boy his own name (Big Metal). *Id.* at *96–97. The boy grew up to become a powerful chief among the Crow people. *Id.* at *101. The rams promised that the Crow people would continue as long as the names of the Bighorn Mountains, the Bighorn Canyon, and the Bighorn River remained unchanged. *Id.* at *97. The rams also promised that hunters from the Tribe would always find plentiful game by visiting the Bighorn Mountains and thinking about the rams who saved Big Metal. *Id.* at *99.

Consistent with oral tradition, the Crow Tribe has protected the Bighorn name. After Yellowtail Dam was built in Bighorn Canyon, the United States government planned to name the reservoir Yellowtail Reservoir. *Id.* at *102–03. The Crow Tribe lobbied the government to ensure that the waters would continue to bear the name of Bighorn. *Id.* Today, the reservoir is known as Bighorn Lake. *See* https://www.nps.gov/bica/planyourvisit/bighorn-lake-in-wyoming-and-montana.htm.

3. Members of the Crow Tribe continue to hunt as they "still need meat, because it is difficult to afford the basic things [they] need to survive." Yellowtail, *supra* at 45. Members of the tribe hunt elk in the Bighorn Mountains and beyond to put "food on [their] table during unforgiving Big Sky winters." Pet. Br. 45; *see also* Frederick E. Hoxie, PARADING THROUGH HISTORY: THE MAKING OF THE CROW NATION IN AMERICA, 1805–1935 at 300–01 (1995) (noting the Crow Tribe's practice of venturing into the Bighorn Mountains to hunt and to gather berries). Traditionally, elk is served to respected guests as the main ingredient in "dry meat stew" or "elk soup." *See* App. A & D, *infra* at a1, a4. Amici also use elk to make sausage and choke cherry Christmas balls. *See* App. B & C, *infra* at a2, a3. All parts of the animal are utilized, and there are traditional Crow recipes for the loin, flank, brisket, shoulder, liver, kidneys, heart, neck, ribs, entrails, and tongue. Joy Yellowtail Toineeta, Absarog-Issawua (from the Land of the Crow Indians) 64–78 (Aug. 1970) (unpublished M.Ed. thesis, Montana State University), *available at* https://scholarworks.montana.edu/xmlui/handle/1/11101. Any way you slice it, elk meat is good, wholesome, and traditional food, packed with healthy lean protein. *See, e.g.*, Peggy Halpern, *Obesity and American Indians / Alaska Natives* 17 (Apr. 1, 2007), *available at* https://goo.gl/za6k71 (noting that "traditional foods are high in protein and low in fat and sugar").

Losing access to off-reservation elk and other game will be especially harmful on the Crow reservation, which is located in a "food desert." The U.S. Department of Agriculture ("USDA") defines

"food deserts" as areas that are low income and where there is low access to healthy food. *See* https://www.ers.usda.gov/data-products/food-access-research-atlas/documentation/#definitions. According to USDA data, the Crow reservation is located in one of the most severe food deserts, where many residents are located more than twenty miles from a supermarket and where access to motor vehicles is low. *See* https://www.ers.usda.gov/data-products/food-access-research-atlas/go-to-the-atlas/ (enter "Crow Agency, MT, USA" in search box and select "LI and LA at 1 and 20 miles" and "LI and LA using vehicle access"). Even members of the Tribe with money to spend, then, have a hard time obtaining fresh meat and vegetables at a well-stocked grocery store within easy traveling distance.

The Crow reservation is not unique in this regard: "In Indian Country, access to food can be a challenge. Many reservations have significant food deserts . . . [and] significantly higher levels of food insecurity than the rest of the population . . ." Anne Gordon & Vanessa Oddo, *Addressing Child Hunger and Obesity in Indian Country: Report to Congress* 5 (Jan. 12, 2012), *available at* https://goo.gl/iVZPLa. The USDA defines food insecurity as a lack of access "at all times to enough food for an active, healthy life." *See* https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us. Researchers have found that rates of food insecurity among American Indians are twice as high as other populations in the United States. Kelly Berryhill, et al., *Food Security and Diet Among American Indians in the Midwest*, J. OF CMTY. HEALTH, 43(5):901-907 (Oct. 2018). Studies suggest prevalence rates of food

insecurity ranging from nearly 40 percent on one reservation, Katherine W. Bauer, et al., *High Food Insecurity and its Correlates Among Families Living on a Rural American Indian Reservation*, 102 AM. J. OF PUB. HEALTH 1346, 1346–52 (2012), to as high as 61 percent across a group of five American Indian communities, Emily J. Tomayko, et al., *Household Food Insecurity and Dietary Patterns in Rural and Urban American Indian families with Young Children*, 17 BMC PUB. HEALTH 611 (2017).

4. Food insecurity is correlated with a number of public health and medical problems. Children, especially young children, who are food insecure display increased incidence of acute illness, iron deficiency, behavioral and developmental problems, impaired language and motor skills, poor school performance, and lower education attainment. Craig Gundersen & James P Ziliak, *Food Insecurity and Health Outcomes*, 34 HEALTH AFFAIRS 1830, 1830–39 (2015). Children experiencing food insecurity are more likely to eat meals from convenience stores, Bauer *supra* at 1346–52, and are more likely to drink soda, consume sports drinks, and eat fried potatoes. Tomayko, *supra* at 611. These unhealthy foods are often less expensive and more accessible on the reservations than healthier options.

Food insecurity is also associated with adverse health outcomes in adults. Food insecurity increases the risk of chronic diseases, including obesity, type 2 diabetes, and hypertension. Nicholas J. Bishop & Kaipeng Wang, *Food Insecurity, Comorbidity, and Mobility Limitations Among Older U.S. Adults: Findings from the Health and Retirement Study and*

Health Care and Nutrition Study, 114 PREVENTIVE MED. 180, 180–87 (2018). Researchers have found that American Indians are 2.4 times more likely to have diabetes, 1.9 times more likely to be obese, and 1.7 times more likely to be in poor or fair health, compared to the non-Hispanic white population. Andrew M. Subica, et al., *Obesity and Associated Health Disparities Among Understudied Multiracial, Pacific Islander, and American Indian Adults*, 25 OBESITY 2128, 2128–36 (2017).

A contributing factor to an increase in diabetes and obesity is that "there has been a shift in Indian Country, whereby American Indians are eating less traditional food and more food that is commercially prepared and processed." Gordon, *supra* at 9. American Indians historically have supplemented their diets through hunting and fishing and growing their own fruits and vegetables. Mary Story, et al., *Nutritional Concerns in American Indian and Alaska Native Children: Transitions and Future Directions*, 98 J. OF THE AM. DIETETIC ASS'N 170, 170–76 (1998). Traditional foods like wild game are slowly being replaced by less healthy processed and convenience foods. Charlene Compher, *The Nutrition Transition in American Indians*, 17 J. OF TRANSCULTURAL NURSING 217, 217–23 (2006). Lean meat obtained from hunting provides a healthy supply of protein and does not convey the same risk for obesity and cardiovascular disease associated with meat from modern domesticated animals that are high in saturated fat. Neil Mann, *Dietary Lean Red Meat and Human Evolution*, 39 EUROPEAN JOURNAL OF NUTRITION 71, 71–79 (2000).

Moreover, the subsistence lifestyle is grueling, with extensive physical activity requirements. Research has shown that hunting on foot has a high metabolic equivalent value beneficial to cardiovascular health. Diana Redwood, et al., *Physical Activity Patterns of American Indian and Alaskan Native People Living in Alaska and the Southwestern United States*, 23 AM. J. HEALTH PROMOT. 388, 388–95 (2009). "The physical activity involved in traditional activities, including food harvesting, combined with the high nutritional value of Native foods may provide a double benefit to decreasing the risks for chronic disease." *Id.* This principle is recognized by a leading federal agency:

> The Centers for Disease Control and Prevention (CDC) is committed to endorsing traditional foods as an effective approach for health promotion and diabetes prevention in American Indian and Alaska Natives ... Hunting and fishing rights are significant in a public health context because many tribal communities rely on these traditional foods for subsistence.

CDC Office for State, Tribal, Local & Territorial Support, *American Indian and Alaska Native Hunting and Fishing Rights*, available at http://goo.gl/LxSYv9. More than a century ago, the Court wrote that usufructuary rights "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *Winans*, 198 U.S. at 381. As the CDC attests, those rights remain important to the health and well-being of native populations.

* * *

The Second Treaty of Fort Laramie, now celebrating its sesquicentennial, has been a boon for the United States, which received peace in the aftermath of the Civil War along with 30 million acres of Crow territory, a small part of which became what is now the Bighorn National Forest. Wyoming seeks to deprive the Crow Tribe of its rights under that federal treaty. That is wrong. The Crow Tribe should be allowed to continue subsistence hunting in the forest lands it ceded away. Notwithstanding the decision below and *Repsis*, there is no basis in precedent, policy, or common sense for depriving the Tribe of its essential treaty rights.

CONCLUSION

The opinion below from the District Court of Wyoming should be reversed.

Respectfully submitted,

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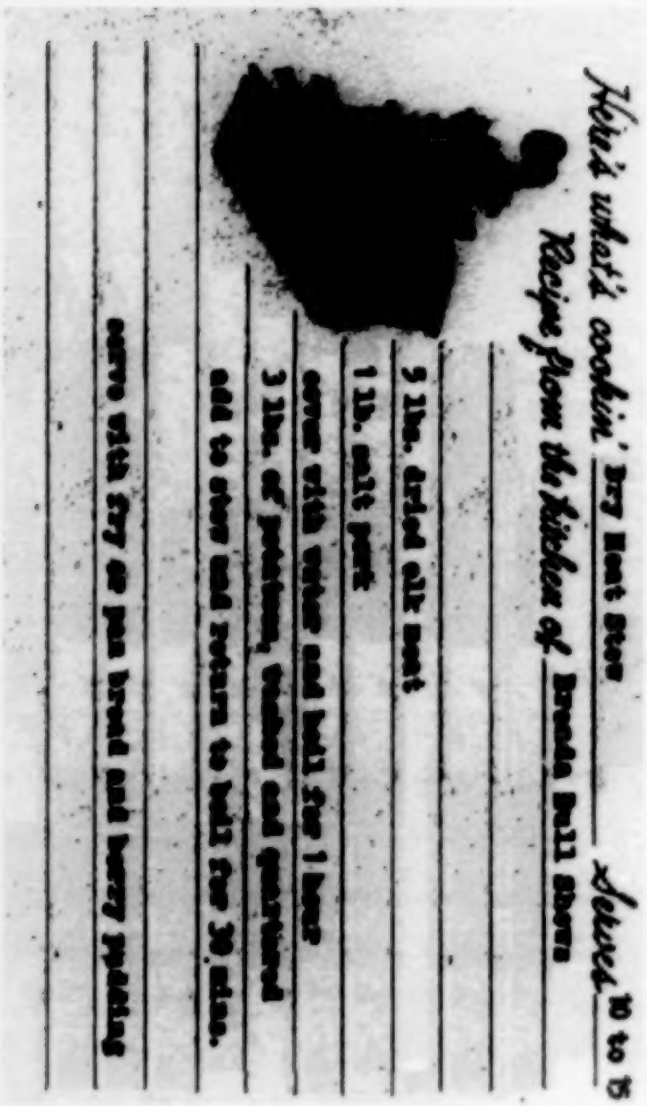
September 11, 2018

APPENDICES

Appendix A



Here's what's cookin' Dry Heat Stew Serves 10 to 15

Recipe from the Kitchen of Brenda Bull Shoes

5 lbs. dried elk meat

1 lb. salt pork

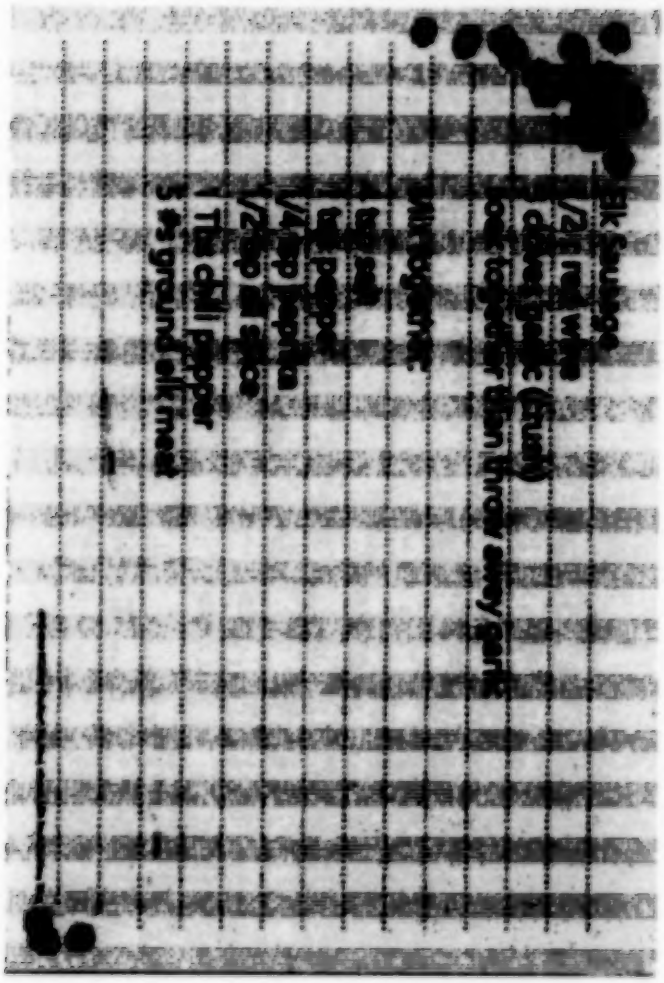
cover with water and boil for 1 hour

3 lbs. of potatoes, cubed and quartered

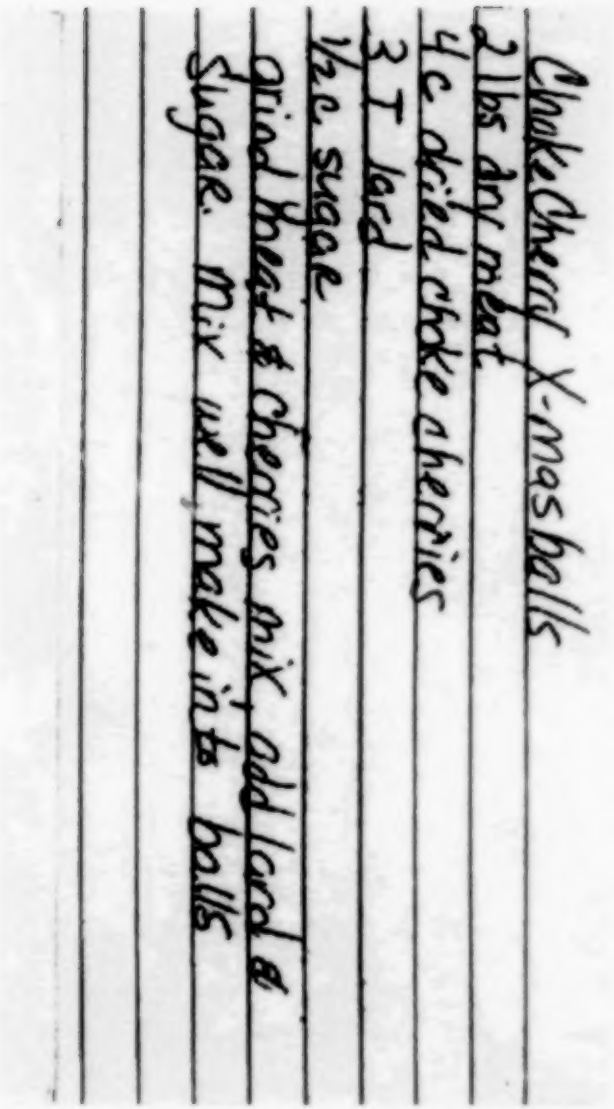
add to stew and return to boil for 30 min.

serve with fry or pan bread and berry pudding

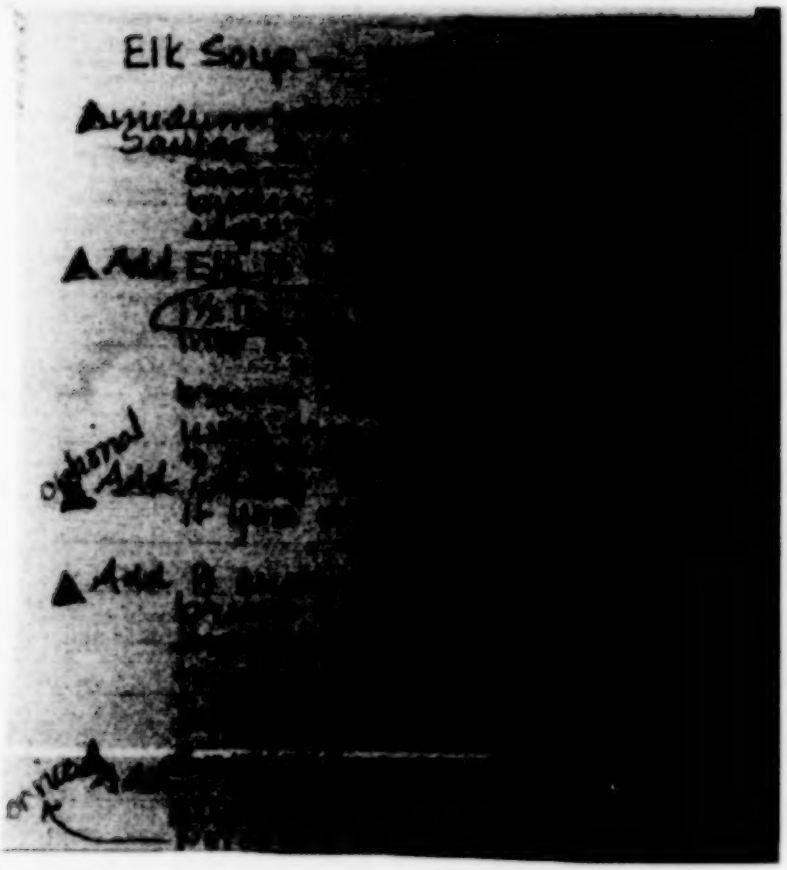
Appendix B



Appendix C


Choke Cherry X-mas balls
2 lbs dry meat
4 c. dried choke cherries
3 T lard
½ c. sugar
grind meat & cherries mix, add lard &
sugar. Mix well, make into balls

Appendix D*



* This recipe for elk soup is a written version of a recipe passed down to *amici* through oral tradition.